BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELAINE C. KUNIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,940
HEINZ PET PRODUCTS	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 15, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for injuries suffered through a series of accidents beginning September 24, 2001, through October 10, 2001. The Appeals Board (Board) heard oral argument on March 8, 2005.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Tracy M. Vetter of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge with the exception of the average weekly wage. In the Award, the Administrative Law Judge (ALJ) utilized an average weekly wage of $1,580.02. However, the agreed upon average weekly wage is $1,730.50 pursuant to the stipulation of the parties filed with the Division of Workers Compensation. Therefore, the average weekly wage will be modified accordingly.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Board finds as follows:

Claimant was employed as a certified management accountant (CMA) for respondent, with her job involving the analysis of the cost of new products. Claimant regularly worked 50 hours a week, averaging approximately seven and a half hours a day on the computer. For six or seven months leading up to claimant's accident, she was involved with a computer conversion, working 70 to 80 hours a week. During this time claimant began developing problems with her upper extremities. Claimant alleges that she suffered a series of accidental injuries beginning September 24, 2001, through October 10, 2001, at which time claimant was provided medical care and placed on restricted duty.

Claimant was referred to board certified orthopedic surgeon John B. Moore, IV, M.D., on October 30, 2001. Dr. Moore originally treated claimant conservatively, ultimately performing bilateral cubital tunnel releases, with the surgery on claimant's left upper extremity on February 13, 2002, and the right on April 3, 2002. He last saw claimant on January 3, 2003. He opined claimant has suffered a 2 percent whole person impairment, which results from a 2 percent impairment to each upper extremity, all pursuant to the fifth edition of the AMA *Guides*.[1] He testified that claimant was unable to return to her employment for respondent, as she was restricted, in his opinion, to performing data entry for no more than four hours a day.

In reviewing a task list prepared by vocational expert Terry Cordray, Dr. Moore found claimant able to perform all of the tasks on the list, although task number 4 (involving data entry) he did limit to four hours a day. As noted above, claimant regularly spent seven and a half hours a day performing data entry work for respondent. Respondent tried to accommodate claimant, but was unable to reduce the amount of data entry claimant was required to perform. Her last day worked was September 14, 2002.

Claimant was referred by her attorney to board certified plastic surgeon Lynn D. Ketchum, M.D. Dr. Ketchum initially examined claimant on June 25, 2002. He also examined her on two more occasions, February 25, 2003, and January 15, 2004. Dr. Ketchum provided claimant restrictions of typing for a maximum of four hours a day, with the recommendation that the typing be broken up to two hours in the morning and two hours in the afternoon. He assessed claimant a 10 percent impairment to the each upper extremity, which results in a 12 percent rating to the whole person, all based upon the fourth edition of the AMA *Guides*.[2] He was provided a task list prepared by vocational

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

expert Bud Langston containing thirteen tasks. Of these, two were determined to be duplicative, resulting in eleven tasks remaining of which Dr. Ketchum found claimant unable to perform four, for a 36 percent task loss. Dr. Ketchum did not actually treat claimant, but did make specific recommendations regarding how to improve her physical condition. Dr. Ketchum confirmed that the surgery provided by Dr. Moore to claimant's cubital tunnels was appropriate treatment for claimant's condition.

Due to her inability to return to work for respondent, claimant sought other employment. Claimant maintained a detailed record of the job search that she conducted. However, in May of 2003, claimant began her own consulting business utilizing Mary Kay Cosmetics. Claimant chose Mary Kay as a product because it did not require a lot of finger and hand movement and because she believed the opportunity for advancement and increased income was significant. Claimant argued that the potential existed for her to earn up to $2,000 per week once her business became established. Claimant was working approximately 40 hours a week in the Mary Kay Cosmetics business while, at the same time, continuing her job search. Claimant's list of job contacts is extensive and details numerous contacts throughout the Topeka area. She testified that if she could find a job as a CMA making the same money she was making with respondent, she would take that job so long as the employer could accommodate her physical limitations. Claimant acknowledged she is looking for jobs for which she is qualified and is not applying for lower level jobs, as those jobs either generally require more data entry or more hand work, both of which claimant asserts exceed her restrictions and would create difficulties.

Claimant provided records of the income generated by her Mary Kay Cosmetics business. The ALJ, in analyzing this information, determined that claimant's gross earnings of $8,093.11, when divided by 57.14 weeks (the period of time over which that income was generated), resulted in a weekly income of $141.64. This results in a wage loss of 91 percent when compared to claimant's pre-injury average weekly wage. As noted, however, the average weekly wage has been modified pursuant to the stipulation of the parties.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[3]

K.S.A. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

[3] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

> weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[4]

The ALJ determined that Dr. Ketchum's 12 percent impairment to the body as a whole was the most legitimate opinion in the record, and the Board agrees. While Dr. Moore assessed claimant a substantially smaller impairment to the upper extremities, Dr. Moore utilized the fifth edition of the AMA *Guides*, which is contrary to the mandate of K.S.A. 44-510e. As Dr. Moore was not asked in his deposition to clarify this opinion, the Board is limited to considering only the opinion of Dr. Ketchum and affirms the ALJ's determination that claimant has a 12 percent impairment to the body as a whole for the injuries suffered through October 10, 2001.

In determining what, if any, task loss claimant has suffered, the Board has considered both the opinion of Dr. Ketchum and the opinion of Dr. Moore. Dr. Moore's task loss analysis, that claimant has suffered no task loss, in the Board's opinion, is not credible. Claimant acknowledged she spent seven and a half hours of her average day doing data entry, which Dr. Moore agreed would exceed her limitations or restrictions. Dr. Moore agreed that claimant would be unable to return to her activities for respondent based upon the numbers of hours of data entry involved. Dr. Moore also considered the functional capacity evaluation (FCE) performed on July 10, 2002, and determined that claimant would be unable to return to her job with respondent. The Board finds that Dr. Moore's zero percent task loss opinion is not credible and adopts the opinion of Dr. Ketchum that claimant has suffered a 36 percent task loss after considering the job task list prepared by vocational expert Bud Langston.

In determining what, if any, wage loss claimant has suffered, the Board must consider the logic set forth in *Foulk*[5] and *Copeland.*[6] In *Foulk*, it was determined that an employee who was offered a job within that employee's ability, but then refused to attempt the job would not be justified in merely sitting at home, refusing to work and taking advantage of the workers compensation system. Additionally, in *Copeland*, the court

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[4] K.S.A. 44-510e(a).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

determined that if a claimant does not put forth a good faith effort to find appropriate employment, then the finder of fact must determine what, if any, post-injury ability that claimant possesses in order to compare the pre- and post-injury wages based upon the imputed wage.

In this instance, claimant continues to search for a job within her field of expertise. Respondent argues that claimant has self-limited her search by refusing to seek the lower level wage jobs which respondent feels claimant would be qualified for. However, as noted by both Dr. Ketchum and Dr. Moore, claimant is limited in her ability to use her hands repetitively. Many lower level jobs involve repetitive data entry, which claimant cannot perform. Additionally, jobs in the manual labor field regularly require repetitive use of the upper extremities in order to perform those tasks. Again, claimant is limited in her ability to use her upper extremities repetitively. The Board does not find claimant's determination to seek employment in her field of expertise to involve a lack of good faith. Claimant's search is continuous and ongoing. The records maintained by claimant show a continued effort on her part to obtain employment, with an ongoing desire to remain in the field where her training and expertise would generate the most income.

Additionally, the Board does not find claimant's attempt to start her own business to constitute a lack of good faith. The Board has held in the past that an appropriate attempt to obtain retraining or to start one's business when done in good faith will not preclude a work disability. In this instance, the Board finds claimant's efforts to appear to be in good faith, as claimant is certainly putting forth the effort to be successful in the field of Mary Kay Cosmetics, with the income potential being equal to or greater than that which claimant was earning while employed with respondent.

In finding claimant has put forth a good faith effort, the Board must next look to what actual earnings claimant is making in order to impute a wage under K.S.A. 44-510e. The ALJ, in determining claimant's average weekly wage, utilized the gross income from claimant's cosmetics business, electing to not take into consideration the expenses generated by that business. The Board has held in the past that business-related expenses can be deducted from income when determining a post-injury average weekly wage.[7]

In this instance, the Board finds, after deducting expenses, claimant has generated no income from her Mary Kay Cosmetics business and, therefore, finds claimant has suffered a 100 percent wage loss resulting from the injuries suffered with respondent

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[7] *Ferguson v. R. D. Ferguson Trucking Company*, No. 169,051, 1996 WL 670489 (Kan. WCAB Oct. 28, 1996); *Logan v. Fry-Wagner Moving & Storage*, No. 206,790, 1997 WL 637751 (Kan. WCAB Sept. 30, 1997); *Gadelkarim v. Atlas Van Lines*, No. 199,449, 2000 WL 1523780 (Kan. WCAB Sept. 29, 2000).

through October 10, 2001. In combining claimant's 36 percent task loss and her 100 percent wage loss, the Board finds claimant has suffered a permanent partial general disability of 68 percent to the body as a whole.

The Board, therefore, modifies the Award of the ALJ to reflect the stipulated average weekly wage and to change the wage loss under K.S.A. 44-510e to 100 percent. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated September 15, 2004, should be, and is hereby, modified, and an award is granted in favor of the claimant, Elaine C. Kunis, and against the respondent and its insurance carrier for injuries suffered through October 10, 2001, and based upon an average weekly wage of $1,730.50 for a 12 percent permanent partial general disability on a functional level, followed thereafter by a 68 percent permanent partial general disability to the body as a whole.

Claimant is entitled to 7 weeks of temporary total disability compensation at the rate of $417 per week totaling $2,919. Claimant is then awarded 41.43 weeks of permanent partial general disability compensation at the rate of $417 per week totaling $17,276.31 for the period October 11, 2001, through September 14, 2002.[8] Thereafter, claimant is entitled to permanent partial general disability compensation payments at the rate of $417 per week for a total award not to exceed $100,000 pursuant to K.S.A. 44-510f(a).

As of March 17, 2005, there is due and owing claimant 7 weeks of temporary total disability compensation at the rate of $417 per week totaling $2,919, followed thereafter by 172.14 weeks of permanent partial general disability compensation at the rate of $417 per week totaling $71,782.38, for a total due and owing of $74,701.38, all of which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, payments are ordered made by respondent and its insurance carrier at the weekly rate of $417 until the maximum benefit of $100,000 is paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

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[8] 48.43 weeks minus 7 weeks of temporary total disability equals 41.43 weeks.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director